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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| LORETTE SPEER,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CLAIRE LIGHTNER,<br><br>Defendant and Respondent. | D049830<br><br><br><br>(Super. Ct. No. GIC834928) |

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed.

Plaintiff Lorette Speer appeals from a judgment in favor of her former family law attorney Claire Lightner entered after a jury found Lightner was not negligent in her representation of Speer in connection with Speer's ex-husband's petition to modify child custody. Speer contends the jury's finding is not supported by substantial evidence. We disagree and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

We state the facts in the light most favorable to Lightner, the prevailing party. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.) In the early 1990s, in connection with divorce proceedings between Speer and her ex-husband Bradley Benson, Speer was awarded "primary custody" of her and Benson's three children, Lauren, Andrew and Brendon.[1] In 1996, Speer, who had since remarried a naval officer, moved with her husband and the children to Puerto Rico for two years, and then Japan for approximately four years. In 2002, Speer, her husband and the children returned to the United States, moving to Carlsbad.

By late 2002, Lauren and Andrew, who were then approximately 16 and 14 years old respectively, expressed a desire to live with their father. Benson filed papers for an order changing physical custody of those two children to him. Speer, represented by Lightner, opposed the request and filed a declaration explaining why the current custody arrangement should not change. Lightner's firm had represented Speer in the mid-1990s when Speer sought to move out of the country with the children. Speer and Benson underwent Family Court Services mediation; after meeting with both parents and the children, the mediator recommended the children remain in Speer's custody. The court at

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1 We refer to the children by their first names to avoid confusion and intend no disrespect. By testifying she had "primary custody" of the children, Speer presumably meant that she had been awarded sole physical custody of the children. (See *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1081, fn. 1 [provisions in the Family Code governing custody of children do not use the term "primary physical custody" but rather the terms "joint physical custody" or "sole physical custody"].)

some point set the matter for hearing on August 29, 2003, and also appointed minors' counsel, who met with Lauren and Andrew as well as others.

As the hearing approached, Lightner discussed the process with Speer and advised her that there was a likelihood Speer would lose on Benson's petition. Speer made it clear to Lightner that she wanted to file an appeal if she obtained an unfavorable ruling in the matter. About nine days before the hearing, Lightner learned in a telephone conference call with Benson's and minors' counsel of the minor's counsel's recommendation that Lauren and Andrew's physical custody be with Benson. Lightner asked the minors' attorney to prepare a written report because she knew Speer would not agree to his recommendation. She advised Speer of the recommendation and at some point contacted another attorney, Andrew Rosenberry, to handle a potential appeal on Speer's behalf as Lightner did not practice appellate work. According to Rosenberry, Lightner explained to him that her expectation was that Speer would lose at the hearing.

Two days before the hearing, Speer met with Lightner and Rosenberry and discussed a Court of Appeal decision (*In re Marriage of Williams* (2001) 88 Cal.App.4th 808) indicating that a parent asking a court to separate siblings would need to show extraordinary emotional, medical or educational needs. They talked about the minors' counsel's oral recommendation and its potential impact; that the recommendation would be given great weight by the judge, and that minors' counsel was not subject to cross-examination at the hearing. At that meeting, Speer retained Rosenberry to represent her at the hearing and wrote him a check for $2000, which was his flat fee for preparation and attendance. According to Lightner, it was not unusual in family law cases to bring in

another attorney in such a short time frame. She pointed out that attorneys in family court were permitted to argue only facts in evidence through written declarations so that Rosenberry, who had all the facts, was only required to address the law. At about the same time, minors' counsel provided Lightner and Rosenberry with his written report.[2] Lightner filed a two-page trial brief limited to challenging the minor's counsel's qualifications to make a recommendation and requesting a statement of decision from the court with leave to file objections to the court's statement. According to Rosenberry, though Benson had the burden of proof on the motion as the petitioner, his and Lightner's agreed-upon strategy was for him to argue the *Williams* case orally so as not to tip off Benson to the weaknesses of the case. He did not file a brief explaining the *Williams* case to the family court judge because the judge would be familiar with it and the rules for family law cases did not require points and authorities unless the court requested them.

On the day of the hearing, Speer and her husband appeared in court with Rosenberry but not Lightner, as they had all agreed Lightner's presence would not be cost effective. While they awaited their turn in court, Rosenberry observed the family court judge issue a ruling permitting a parent to move away with the children on an ex parte basis, a ruling that surprised him and struck him as wrong. Even though he already

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[2] Rosenberry conceded the minors' counsel's report was required to be given to the parties 10 days before the hearing. However, he pointed out he and Lightner already knew the report's conclusions and expected to receive the written report close to the hearing. According to Rosenberry, a decision was made to go forward without objection as to timeliness.

believed Speer would probably lose on Benson's petition and had told her so, Rosenberry decided it was his obligation to tell Speer and her husband that he believed the judge had ruled incorrectly.

Thereafter, at a break, Rosenberry asked Benson's attorney if there was some possibility of a compromise; the attorney told him Benson would permit Lauren to stay with Speer if Andrew would live with him. Rosenberry spent the next two and a half hours off and on discussing the situation with Speer and her husband in the courtroom lobby and allowing them to discuss the matter alone. Rosenberry continually pushed off Benson's counsel and the bailiff so that Speer and her husband would not be pressured into making a decision. Finally, Speer's husband told him they had agreed to permit Andrew to live with Benson subject to a review hearing. The parties then placed a stipulation under oath and on the record before the family court judge, who confirmed with Speer and Benson that they heard, understood and agreed to be bound by the court's order. The minors' counsel advised the court he believed the agreement was in the best interests of the children. According to Rosenberry, he never pressured or threatened Speer that the judge would retaliate against her if she did not reach a compromise, nor did he persuade her to enter into the settlement.

After the hearing, Speer sent Rosenberry a letter asking for her money back. Also, at some point, Speer contacted Lightner, who had been out of the country, and told her she was unhappy and felt she had been pressured into a settlement. Lightner explained that there were procedures for setting aside a stipulation and, after speaking to Rosenberry who denied coercing Speer, referred Speer to different counsel. Lightner

eventually asked Speer to permit her to substitute out as counsel and when Speer declined, Lightner successfully moved to be relieved as Speer's counsel based on the breakdown of their relationship.

In August 2004, Speer filed suit against Lightner for breach of contract, breach of fiduciary duty and professional negligence. The matter proceeded to a jury trial on Speer's negligence cause of action. Each party presented expert testimony concerning the applicable standard of care and whether the standard of care was met by Lightner and Rosenberry's actions. The jury returned an eleven-to-one verdict finding Lightner was not negligent during her representation of Speer in the child custody action. Speer timely filed this appeal.

## DISCUSSION

### I. *Standard of Review*

We review a jury's findings of fact under the substantial evidence standard. (*ASP Properties Group, L.P. v. Fard, Inc.*, *supra*, 133 Cal.App.4th at p. 1266.) Under that standard, " 'we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its

own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. . . . [Citations.]' [Citation.] To be substantial, the evidence must be of ponderable legal significance, reasonable in nature, credible, and of solid value. [Citation.] However, substantial evidence is not synonymous with *any* evidence. [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' " (*Ibid*.)

"[E]ven if the judgment of the trial court is against the weight of the evidence, we are bound to uphold it so long as the record is free from prejudicial error and the judgment is supported by evidence which is 'substantial . . . ' " (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "Moreover, we defer to the trier of fact on issues of credibility. [Citation.] '[N]either conflicts in the evidence nor " 'testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " [Citations.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., " 'unbelievable per se,' " physically impossible or " 'wholly unacceptable to reasonable minds.' " ' " (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

II. *Contentions*

Speer argues that the evidence presented to the jury in this case demonstrates "a complete lack of diligence" by Lightner or her associated counsel Rosenberry in advocating on her behalf; that it "does not support a finding that Lightner and/or

Rosenberry exercised the skill, prudence, and diligence as lawyers of ordinary skill and capacity." Specifically, Speer argues that though Lightner and Rosenberry were aware of legal authority and facts supporting Speer's position, Lightner did not present any legal authority to the trial court in her two page trial brief because she did not want to tip off opposing counsel, she did not call any witnesses or experts at trial, and she did not make any evidentiary arguments regarding the impact of separation on siblings. Speer also points to Rosenberry's testimony that family court attorneys do not file trial briefs so as to avoid tipping off opposing counsel. She argues that despite evidence of lack of stability and supervision in Benson's household, Lightner and Rosenberry did not advance any such legal or factual arguments on those matters, nor did they argue that Benson had not met his burden to show a substantial change of circumstance warranting such a custody change.[3] Finally, Speer argues Rosenberry failed to perform his professional duties when he forced her into an unwanted settlement instead of proceeding with the hearing and pursuing an appeal.

Lightner responds that there is substantial evidence in the record to support the jury's conclusion in the form of her expert's testimony, which by itself constitutes substantial evidence to support the jury's finding. She also points to the testimony of

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3 In making these contentions, Speer states the court excluded certain assertedly significant evidence (purported evidence of Andrew's drug use). However, she does not challenge any of the trial court's evidentiary rulings with legal argument or authority. We are not required to make Speer's arguments for her (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545), and we deem abandoned points that are not supported by reasoned argument or authority. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Benson's counsel, who testified without objection that he did not see either Lightner or Rosenberry do anything during their representation that fell below the standard of care, and the minors' counsel, who testified he thought Rosenberry "vigorously" argued on his client's behalf and did not "roll[] over."[4]

III. *Analysis*

We begin our analysis by pointing out that Speer has arguably waived her sufficiency of the evidence arguments by failing to summarize *all* of the material evidence, including the evidence that is damaging to her case. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 8:71, pp. 8.32.1-8.32.2.) By stating only her own evidence on the issues, i.e., evidence tending to support a conclusion that Lightner was unaware of the relevant child custody legal standards or did not present sufficient legal authority to the family court judge, Speer ignores the settled principles of substantial evidence review that we have set forth above.

Indeed, Speer's appellate arguments largely reargue the issues in the underlying family law case – she discusses case law pertaining to modification of custody arrangements and the importance of maintaining sibling bonds, rather than analyzing the legal standards pertaining to the issues in the malpractice case such as the attorney's duty

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4 Lightner's references to the reporter's transcript that assertedly reflect these opinions are inaccurate. We independently located the relevant portions of their testimony in the record.

to meet a particular standard of care and breach of that standard of care.[5] The record may well contain abundant evidence that Lightner's representation of Speer in handling Benson's custody petition fell below a reasonable family law attorney's standard of care – indeed Speer presented expert testimony expressly reaching that conclusion. But the jury obviously rejected that expert testimony, and our analysis on appeal is not to resolve such conflicts in the evidence, but to assess the entirety of the record for evidence supporting the jury's conclusion that Lightner did not fall below the relevant standard of care. Speer's failure to squarely address why the trial evidence *viewed in the light most favorably to Lightner* does not support the elements of her professional negligence cause of action is an independent reason for us to uphold the judgment in this case.

Setting aside these fatal flaws, we are unpersuaded by Speer's arguments on the merits. Under the substantial evidence standard, the testimony of a single credible witness, even that of the party, may be sufficient to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134.) Here, Lightner's expert, certified family law specialist George Hurst, testified that if Lightner or Rosenberry had sought a continuance due to the

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[5] The elements of a cause of action for legal malpractice in a civil proceeding are (1) the attorney's duty to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536.) Here, the jury found Lightner was not negligent in her representation, i.e., that she did not breach the duty of care stated above. Our task on appeal, as we have explained, is to search for substantial evidence to support that finding.

delay in receiving the minors' counsel's written report, it would not have changed the outcome of the proceeding without new facts. Both Rosenberry and Lightner testified they were by then already aware of the minors' counsel's conclusions. The jury could infer from Hurst's testimony that an attorney faced with these circumstances would not breach the standard of care by deciding to proceed rather than requesting a continuance that would not have changed the outcome of the matter. Hurst also testified Rosenberry did nothing wrong by exploring or recommending to Speer that she settle the case, as his duty was to honestly assess the probability of success versus failure and present his best opinion on it and recommend settlement if he felt her chances of success were poor. Speer does not in this appeal challenge Hurst's expert qualifications, the foundations for his opinions, or the adequacy of his conclusions. His testimony itself constitutes substantial evidence from which a jury may conclude Lightner and Rosenberry were not negligent in these aspects of their representation of Speer.

In addition, Lightner herself testified she did nothing wrong by bringing Rosenberry into the matter only two days before the hearing; that this was common among busy family law practitioners and also was not problematic because Rosenberry merely had to come into the hearing and orally argue the law. She further testified she did nothing wrong by allowing Rosenberry to appear with Speer without her; that the facts were already before the court and it would not have been necessary to have two attorneys present, and they discussed that issue with Speer. Brian Cochran, Benson's counsel, testified without objection that he did not see anything in Lightner or Rosenberry's representation that fell below the standard of care. Speer does not address

this testimony or explain why it is insubstantial or otherwise legally insufficient to support the jury's verdict. We conclude Lightner and Cochran's testimony constitutes additional evidence supporting the jury's finding that Lightner was not negligent.

Finally, Speer's assertions as to Rosenberry are premised on the notion that he forced her into an "unwanted" settlement, and ignored her specific instructions to oppose Benson's petition. But the jury could reasonably conclude from the evidence that Speer did not unwillingly enter into the stipulation at the close of the August 29, 2003 hearing. Rosenberry described Speer and her husband as intelligent, concerned and focused at the hearing and he stated they asked a lot of questions. He assessed Speer's husband, who was present with Speer the entire time, as a steady and stable decisionmaker. Rosenberry testified that after approximately two hours of discussion between themselves, Speer's husband advised him that he and Speer had "looked at all sides of this," that they considered Lauren's needs and Andrew's situation and decided the settlement was the "best decision to make under the circumstances." Rosenberry explained that Speer told the family court judge under oath and on the record that she understood and agreed to the compromise she had reached with Benson. He denied forcing Speer into doing anything that morning, or threatening or pressuring her into entering into the settlement. The fact that Speer's husband testified Speer accepted the compromise "in tears, very traumatically" and only did so based on her belief that Rosenberry gave her good advice and would be able to "get Andrew back" is conflicting evidence that we disregard in our search for substantial evidence. (*Estate of Teel* (1944) 25 Cal.2d 520, 527; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

Thus, we reject Speer's argument that insufficient evidence supports the jury's verdict on her negligence claim. The jury was entitled to conclude the testimony of Hurst and Lightner was reasonable and credible, and on that evidence conclude that Lightner was not negligent.

## DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.